THE

AMERICAN LAW REGISTER.

AUGUST, 1863.

NOTES UPON THE TRAVERSE DE INJURIA.

This traverse, which occurs generally in the replication, was an ingenious device of the old pleaders to evade the stringency of the rule which forbade more than one replication to a plea, and was in fact a sort of *general issue* replication.

The general issues applicable to actions *ex contractu*, as well to the old action of debt as to the more modern actions of trespass on the case, and *assumpsit*, were much more comprehensive in their scope, and opened a much wider field of inquiry than the general issues in the forms of action *ex delicto*. The latter, as a general rule, put in issue only the specific allegations of the declaration. Matters of excuse or justification, which were admissible in evidence under the general issue in actions founded on contract, were excluded when the action was founded on tort. In those cases the defendant was driven to special pleading to introduce his defence, and this he might do under the statute by use of the formula, "With leave of the Court first had and obtained," in as many pleas as he thought proper. This liberality was not, however, extended to the replication, and in consequence the plaintiff in his reply was restricted to the denial of some one or

other of the allegations which went to make up each plea. And as this denial was an admission of the other allegations not embraced in the issue, it put the plaintiff at great disadvantage. To remedy this the ingenuity of the ancient pleaders invented the traverse "*de injuria sua propria absque tali causa*," as it was called, which, in cases to which it was applicable, had the effect of throwing upon the defendant the necessity of proving all the material allegations in his plea, just as the issue *non assumpsit* threw upon the plaintiff the burden of proving all the allegations in his declaration.

The introduction in England, in Hilary Term 1834, of the New Rules of Pleading, as they are still called, by which the effect of the general issue in actions *ex contractu* was made to be the mere denial of the precise facts alleged in the declaration: thus compelling defendants to plead specially all defences by way of excuse or justification, and involving the plaintiff in the embarrassments and difficulties growing out of the rule which limited him to a single replication to each plea, induced an examination in England into the applicability of this replication to actions *ex contractu*, to which it was found as well suited as to actions *ex delicto*. Its availability in such cases is not recognised in any American decisions known to the writer.

Like most other forms of pleading, this derives its name from prominent words used in the original form—the equivalent words at the present day being "of his own wrong, and without the cause in his plea alleged—"without," "*absque hoc*," "*absque tali causa*," are words adopted in all formal traverses. They express a negative, as used in this replication, signifying "and not for;" accordingly the language of the older entries sometimes is "*et nemy per tiel cause.*"

Crogate's Case, 8th Reports 66, is the leading authority on this subject. Edward Crogate brought an action of trespass against one *Robert* Marys for driving his cattle, and the defendant pleaded in effect that the cattle were trespassing on the ground of one *William* Marys, and the defendant, as servant to the said William, and by his command, *molliter* (without unnecessary vio-

lence), drove the cattle out of the said place, &c. The plaintiff replied *de injuria*, &c., upon which the defendant demurred in law.

The plaintiff contended that the replication was good, because the defendant did not claim any interest, but justified by force of a commandment, and that *de injuria sua propria* shall refer only to the commandment, and to no other part of the plea. But the replication was pronounced insufficient, and four resolutions were come to:—

First. That the words *absque tali causa* do refer to the whole plea; and therefore in false imprisonment if the defendant justifies by a *capias* to the sheriff, and a warrant from him to the defendant *de injuria* is no good replication, for then matter of record, namely, the *capias*, will be parcel of the cause, as well as the warrant from the sheriff to the defendant, for all makes but one cause; and matter of record ought not to be put in issue to the jury, but the plaintiff may in such case reply *de injuria*, and traverse the warrant which is matter of fact. But the resolution goes on to say, upon such justification by force of any proceeding in the Admiralty Court, hundred, or County Court, or any other which is *not a Court of record*, there *de injuria* generally is good, for all is matter of fact, and all makes but one cause.

Second. "Where the defendant in his own right, or as a servant to another, claims any interest in the land, or any common or rent growing out of the land; or any way or passage upon the land, &c., there *de injuria* generally is no plea. But if the defendant justifies as a servant, there *de injuria* in some of the said cases, with a traverse of the commandment, the same being made material, is good; for the general replication *de injuria* is properly when the defendant's plea doth consist merely upon excuse, and upon no matter of interest whatsoever."

In New York it is held, notwithstanding the latter part of the first resolution, in *Crogate's Case*, that *de injuria* is not a proper replication when the plea sets up justification under the authority of a Court *not* of record. Because they say the second rule in *Crogate's Case* is that *de injuria* is only proper where the matter

pleaded offers an excuse, not where it insists that the matter complained of was done in the performance or discharge of a lawfully imposed right or duty: *Coburn* vs. *Hopkins*, 4 Wend. 577; *Lytle* vs. *Lee*, 5 Johns. Rep. 114; and see *Catterall* vs. *Lees*, 8 Mann., Grang., and Scott 113; 65 Eng. Com. Law Rep. 113; where Mr. Justice MAULE uses this language: "The replication *de injuria* is only applicable to a plea which shows that the plaintiff never at any time had a cause of action against the defendant;" and the Court apparently adopted the argument of counsel when they say, "The fallacy is in confounding an exemption from liability existing at the time of the act done, with an exemption from liability at the time of the action brought—*de injuria* can only be replied where the plea sets up matter existing at the time of the act done, which gives a *primâ facie* and apparent cause of action. The defendant does not say by his plea that at the time at which the cause of action is alleged to have accrued he was not liable; he admits the cause of action, and sets up matter of subsequent discharge. But there is a manifest distinction between such pleas and those which rely upon matter of discharge and extinguishment of the right of action; as to which latter class no authority has been cited to show the general form of traverse is allowable, and indeed it is excluded by the very terms of the rule above referred to. Thus in a plea of payment, or accord and satisfaction, or release, or of any matter which extinguishes the right to sue, both the rules of pleading and the course and practice, from the earliest time, require the plaintiff to make a traverse of, or to deny the material fact stated in the plea, which constitutes the discharge or extinguishment of the right of action."

The third resolution in *Crogate's Case* is, "That when by the defendant's plea any authority or power is mediately or immediately derived from the plaintiff, there, although no interest be claimed, the plaintiff ought to answer it, and shall not reply generally *de injuria sua propria*." This resolution is fully recognised and acted upon in the case of *Milner* vs. *Jordan*, 8 Adol. & Ellis 620; 55 Eng. Com. Law Rep. 620.

In *Salter* vs. *Purchell*, in the Exchequer Chamber, 1 Adol. &

Ellis 210 (41 Eng. Com. Law 506), Chief Justice TINDAL thus clearly explains the rule: "The rule by which the plaintiff has been permitted to use this general form of replication, instead of being compelled to take issue on some material fact stated in the defendant's plea, has always been limited in its terms and in its application to cases of actions brought for personal injuries, where the facts stated in the plea amount merely to matter of excuse or justification of the act complained of. As where in trespass for assault and battery there is a plea of *son assault demesne*, or a plea of *molliter manus imposuit* in defence of possession; or in false imprisonment, where there is a plea that the plaintiff broke the peace, and that he the defendant being a constable and present, took him in order to carry him to a justice of the peace; or in an action on the case for defamation, where the plea justifies by reason of the truth of the words spoken; in all which and similar instances the facts stated in the plea show that at the time the act complained of was done, it was done under circumstances which make it excusable or justifiable in the eye of the law. And it is to such pleas only that the rule in *Crogate's Case* applies.

The fourth resolution in *Crogate's Case* determined that under the particular facts in that case, the issue would be full of multiplicity of matter, when an issue ought to be full and single; that is to say, that *de injuria* being a denial of the whole plea, would in that case be bad for duplicity.

The fourth resolution is not adhered to in modern practice as closely as the other three. The case of *O'Brien* vs. *Saxon*, for instance, 2 Barn. & Cress. 918, 9 Eng. Com. Law Rep. 908, was an action for maliciously suing out a commission of bankruptcy against the plaintiff. The defendant pleaded that the plaintiff being a trader, and being indebted to the defendant in the sum of 100*l.*, became bankrupt, whereupon the defendant sued out the commission. Replication *de injuria*, demurrer assigning for cause that the plaintiff by the replication had attempted to put in issue three distinct facts—the act of bankruptcy, the trading, and the petitioning creditor's debt. The Court overruled the demurrer, because the three facts connected together constituted but one

entire proposition. See also *Selby* vs. *Bardons*, 23 Eng. Com. Law Rep. 1; 3 Barn. & Adol. 1. An avowry in *replevin* set up "that the plaintiff was an inhabitant of that part of St. Andrews, Holborn, which is above the bars, and occupier of a tenement in the parish of St. George the Martyr; that the rate was duly made and published for those districts, in which the plaintiff was rated at 7*l.*, of which the defendant who was collector gave him notice and demanded payment, which being refused he summoned him before the justices where he appeared, but showing no cause for his refusal the justices made their warrant to defendant to distrain, under which he and the other defendant as his bailiff took the goods and chattels in the declaration mentioned as a distress. Plea, *de injuria* and demurrer.

The demurrer was overruled by Justices PATTESON and PARKE, Lord TENTERDEN, the Chief Justice, dissenting. This judgment was afterwards affirmed in the Exchequer, Chief Justice TINDAL delivering the opinion: 3 Tyrwh. 431.

The applicability of this traverse to actions *ex contractu* has, as has already been said, been much considered in recent times. Lord DENMAN, in *Purchell* vs. *Salter*, 1 Adol. & Ellis 501, says: "Upon the best consideration we can give it, we think that if the law allows a plaintiff to say that the defendant of his own wrong, and without the cause alleged in his plea, committed the trespass (as in trespass), or took the goods and cattle (as in *replevin*), or spoke or published the words, or published the libel (as in defamation), or committed the grievances (as in malicious prosecution), or allows again to a defendant, where the pleadings go beyond a replication, to say that the cattle, for instance, were in the close of the plaintiff, of the wrong and injury of the plaintiff, and without the cause by him in his pleading, as the case may be, in trespass or *replevin* alleged. So also it should seem that the principles of pleading may be extended to say that a defendant of his own wrong, and without the cause, &c., broke the covenant, or broke the promise, &c., or refused to pay the debt, or, if the form be liked better, broke the contract; or in debt (if the language 'of his own wrong' ought not to be introduced into actions

of debt, these words might be altogether omitted), and it might be said that the defendant, without the cause alleged, refused to pay the debt, &c. But if this compendious form of replication be allowed in these actions, it may be necessary to confine the plaintiff within some limits. And in considering that there are a number of exceptions to this general pleading laid down in *Crogate's Case;* and though these rules may be thought not to have a direct application to actions on promises and debt; yet we think that if in consequence of a new practice of pleading being introduced, a form of replication not before in use in any particular form of action should be adopted into it from some other, the most convenient course is also to adopt the rules and exceptions which had applied to it in that form, as far as they are properly applicable to the class of actions in which they are so adopted."

This reasoning has been considered conclusive in England, and a great variety of cases illustrate its application in practice. The distinction between matter of excuse and matter of discharge is kept up quite rigidly as matter of doctrine, though the practical application has in some cases been found embarrassing, and perhaps all the decisions on that subject are not quite consistent. The general rule, no doubt, is properly stated in these words: When the defendant's plea consists of mere matter of excuse, the plaintiff may reply generally, that the defendant broke his promise without the cause alleged, and so put the whole plea in issue.

Matter of excuse, to be put in issue by the replication *de injuria*, must be such in the first place as admits the contract, and in the second such as is not in the nature of a discharge or acquittance. Thus in *Scott* vs. *Chappelow*, 4 Mann. & Grang. 336 (43 E. C. L. R. 179), the action was against the acceptor of certain bills of exchange, who pleaded specially at length certain matters which amounted to an allegation of no consideration for the acceptance, the replication *de injuria* and demurrer followed. The replication was held good, MAULE, J., saying, "The rule in *Crogate's Case*, which is founded in good sense, is this: If the cause of action be admitted, but an excuse is set up, by which the defendant does not

claim any interest in the matter of dispute, or rely upon any authority derived from the plaintiff, or given by law, then, the general replication *de injuria* is sufficient, and the reason seems to be that it would be hard to put the plaintiff to traverse one fact only, when the defendant's excuse consists of several. Now, the substance of this declaration is, that the defendant accepted two bills of exchange, which were drawn upon him by the plaintiffs. This is admitted by the plea, and therefore a *primâ facie* cause of action is admitted by the defendant; but he says that he is excused from paying the bills by reason of the special matter, which, he states, if any portion of this excuse had arisen from an authority derived from the plaintiffs not to pay—as if the defendant had set up accord and satisfaction—I think the case would have fallen within the exception in *Crogate's Case.*" See also *Basan* vs. *Arnold*, 6 Mees. & Wels. 559; *Reynolds* vs. *Blackburne*, 7 Ad. & Ellis 161 (E. C. L. R. vol. 34); *Griffin* vs. *Yates*, 2 Bing. N. C. 579 (E. C. L. R. vol. 29); and it is said, whenever fraud is of the essence of the defence, *de injuria* may be replied: *Bennett* vs. *Ball*, 1 Exch. 593; *Tolhurst* vs. *Notley*, 11 Ad. & Ellis, N. S. 406 (E. C. L. R. 404). This replication applies as well in debt as in *assumpsit: Cowper* vs. *Garbett*, 13 M. & W. 33.

In the following cases the replication was not allowed, because the defence set up by the plea consisted of matter of discharge: *Jones et al.* vs. *Senior*, 4 Mees. & W. 123; *Cleworth* vs. *Pickford*, 7 M. & W. 314. In the following cases it was held that *de injuria* could not be replied, because the plea was a denial of any cause of action, not an excuse for non-performance: *Elwell* vs. *Grand Junc. R. Co.* 5 Mees. & W. 669; *Whittaker* vs. *Mason*, 2 Bing. N. C. 359 (E. C. L. R. vol. 29); *Schild* vs. *Kilpin*, 8 M. & W. 673.

If the plea is in substance set-off, *de injuria* cannot be replied: *Salter* vs. *Purchell*, 1 Ad. & Ell. or Queen's Bench 209.

The subject does not seem to have been much considered in the American Courts. In *Tubbs* vs. *Caswell*, 8 Wend. 129, the Court expresses the opinion that *de injuria* can only be used in actions *ex delicto*, and in *Coffin* vs. *Bassett*, 2 Pick. 357, they so decided.

The District Court for the City and County of Philadelphia, while the rules of 1842, requiring special pleas after the manner of the rules of Hilary Term 1834, were in force, expressed a determination to follow the English practice: *Lincoln* vs. *Souder*, 4 Penna. Law Jour. 107. P. P. M.

RECENT AMERICAN DECISIONS.

Supreme Court of Maine.

JACKSON *vs.* THE Y. & C. RAILROAD COMPANY.

Without some statutory provision, no action can be maintained in the name of an assignee, upon interest coupons, which contain no negotiable words, nor language from which it can be inferred, that it was the design of the corporation issuing them, to treat them as negotiable paper, or as creating an obligation distinct from, and independent of, the bonds to which they were severally attached when the bonds were issued.

The negotiability of such coupons is a question of law, to be determined, from the papers themselves, by fixed and well-settled rules; and proof of custom, as to the negotiability of them, is inadmissible.

The bonds being specialties, the remedy for breaches thereof, is by an action, not of assumpsit, but of debt or of covenant broken; not being *legally* assignable, no action is maintainable in the name of the holder, though he be assignee. GOODENOW, J., dissenting.

It is indispensable to its maintenance that the cause of action exist at the time the action was commenced. The statute of 1856, c. 248, does not remedy this defect.

This was an action of *assumpsit*, brought on eleven memoranda in writing, called "coupons," issued by the defendant corporation, promising to pay various sums of money on each of said coupons, on the first day of May, 1854. The general issue was pleaded. The plaintiff, after reading the writ and coupons, called Daniel C. Emery, who testified that he signed the coupons declared upon in the writ, as treasurer of the defendant corporation; that these coupons were issued by the said corporation in connection with and attached to certain bonds, upon the same sheets of paper with the bonds, and that they were each and all so issued by the defendant